

MIOSHA

Michigan Occupational Safety and Health Administration (MIOSHA)
Department of Labor and Economic Opportunity (LEO)

AGENCY INSTRUCTION

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MIOSHA-COM-15-4R3

DATE:

October 17, 2022

SUBJECT: Interviews in Safety and Health Investigations

- I. Purpose. This instruction provides clarification on proper procedures when conducting interviews for enforcement investigations under Section 29(1) of the Michigan Occupational Safety and Health Act. The goal is to establish an environment where the employee is able to provide as much information as possible during an interview with MIOSHA enforcement staff.
- II. Scope. This instruction applies to MIOSHA enforcement staff in the Construction Safety and Health Division (CSHD) and General Industry Safety and Health Division (GISHD).
- III. References.
 - A. [Bureau of Safety and Regulation, General Industry Safety and Health Division v. Detroit Diesel Allison Parts Distribution Center](#), Docket No. NOA 843544 (Dec. 14, 1990).
 - B. [Michigan Administrative Procedures Act](#), R24.201 et seq., P.A. 306 of 1969, as amended.
 - C. [MIOSHA Field Operations Manual](#) (FOM), as amended.
 - D. [Michigan Occupational Safety and Health Act](#), MCL 408.1001 et seq., P.A. 154 of 1974, as amended.
 - E. [Occupational Safety and Health Administration Letter of Interpretation, February 21, 2013](#), Representation for Workers Without a Collective Bargaining Agreement.
- IV. Distribution. MIOSHA Staff; Federal OSHA; S-drive Accessible; MIOSHA Messenger; and Internet Accessible.
- V. Cancellations. This cancels all previous versions of this agency instruction.
- VI. Next Review Date. This instruction will be reviewed in five years from date of issuance.
- VII. History. History of all previous versions include:

MIOSHA-COM-15-4R2, August 3, 2022
MIOSHA-COM-15-4R1, July 19, 2016
MIOSHA-COM-15-4, October 6, 2015
- VIII. Contact. [Dawn C.M. Jack](#), Appeals Director
- IX. Originator: Barton G. Pickelman, CIH, Director

X. Significant Changes.

- A. Removes restriction on persons present during a private interview being limited to MIOSHA staff, interpreter, court-reporter, or another individual needed to conduct the interview due to physical limitation or disability of the interviewee.
- B. Provides guidance on how to handle a request by an individual being interviewed for the presence of an additional person(s) during the interview.
- C. Provides guidance for addressing roles and restrictions for an additional person(s) present during interviews.

XI. Background. Section 29(1) of the Michigan Occupational Safety and Health Act (Act) permits a MIOSHA representative to privately question the employer, owner, operator, agent, or an employee with respect to safety or health in the course of an inspection or investigation. However, the unwillingness of some employees to speak with a MIOSHA representative privately lead MIOSHA inspectors to begin to permit the presence of another person at the employee's request. At times, this accommodation of an employee's request led to the union representative, management representative, or both, being present in the interview.

In 1990, this practice by MIOSHA inspectors was challenged in *Bureau of Safety and Regulation, General Safety and Health Division v. [Detroit Diesel Allison Parts Distribution Center](#)*, Docket No. NOA 843544 (Dec. 14, 1990). In *Detroit Diesel*, the employer challenged whether MIOSHA could privately question employees during an inspection with a union representative present but excluding the employer representative. The Administrative Law Judge (ALJ) ruled that the Act's usage of the word "private" limited the interview to a private interview with the MIOSHA inspector and the employee. The ALJ also opined that MIOSHA, the employee, and employer could agree to have other people present if they desire, but MIOSHA allowing the employee representative to attend while excluding the employer representative was not permitted.

Following the *Detroit Diesel* decision, MIOSHA amended its [Field Operations Manual](#) (FOM) to state:

Whenever an employee expresses a preference that an employee representative be present for the interview, the SO/IH shall make a reasonable effort to honor that request. In such cases, the employer representative also has the right to be present.

On February 21, 2013, the Occupational Safety and Health Administration (OSHA) issued a [Letter of Interpretation](#), known as the Sallman letter, clarifying the ability of employees to utilize persons affiliated with a union organization as their employee representative during an inspection and as a walk-around representative without a collective bargaining agreement at their workplace. In light of this interpretation of the OSH Act, OSHA re-examined MIOSHA's policy regarding permitting an employer representative to attend an employee interview if the employee representative was present in the context of MIOSHA's mandate to operate a program "at least as effective as" the OSHA program.

Following discussions with OSHA, MIOSHA issued a revised Field Operations Manual (FOM) in November 2013. The revised FOM removed the provision which permitted the employer's representative to be present in employee interviews where the employee's union representative is present.

After the 2013 revision of the FOM, MIOSHA received inquiries from staff, employee representatives, and employer representatives, regarding whether employees may request other individuals, such as an attorney, a member of management, relative or community member, to be present during a MIOSHA investigatory interview. MIOSHA also fielded questions regarding to what extent an individual present during an interview can participate in the interview and how to handle an individual whose presence or conduct during the interview disrupts or impedes the interview and investigatory processes. In July 2016, MIOSHA revised this instruction to provide additional guidance related to those questions.

On April 25, 2017, OSHA rescinded its letter of interpretation of the Sallman letter. After the rescission, MIOSHA carefully examined its prior legal rulings in Michigan, Section 29(1) of the Act, and the impact of its current policy on interviews conducted during the inspection on the investigatory process. MIOSHA was also receiving requests from various parties to be included in the private employee interviews. Accordingly, on August 3, 2022, MIOSHA revised this instruction to outline limited exceptions to the private interview format authorized under the Act.

While the rescission was consistent with applicable legal precedent, the plain language of the Act, and the mission of the agency, the practical implications of the new guidance prompted MIOSHA to revisit this instruction. In consultation with OSHA and in consideration of the impact of the August 3, 2022, instruction on affected employee and employer representatives, MIOSHA has determined that reinstatement of its prior 2016 guidelines is necessary with modifications.

XII. Interview Participants.

Except as outlined in this section, interviews with an employer, owner, operator, agent, or an employee shall be conducted by the SO/IH, in private, in accordance with the Act. Any of the following individuals may be present with the SO/IH during the interview:

- A. An individual employed by MIOSHA who is present for observational and/or training purposes.
- B. An individual hired by MIOSHA to perform transcription, or video or audio recording services for the interview, such as interviews taken under oath per an Administrative Subpoena authorized under Section 29(3) of the Act.
- C. An individual hired by MIOSHA to perform language interpretation or translation services to assist the SO/IH with conducting the interview.
- D. An individual hired or arranged for by MIOSHA to assist the SO/IH with conducting the interview of a person with a disability.

XIII. Preliminary Interview Procedures.

At the beginning of an interview, the safety officer/industrial hygienist (SO/IH) should identify themselves to the interviewee by showing their credentials and provide the interviewee with a business card should the interviewee wish to contact the SO/IH at a later time to provide further information. The SO/IH is to explain to the interviewee that this is an official government investigation by MIOSHA and that the reason for the interview is to gather truthful and factual information relevant to the investigation. The SO/IH must inform the interviewee that the Act allows a MIOSHA inspector the right to interview the interviewee privately. The SO/IH must inform the interviewee that the Act makes it unlawful for the employer to discriminate against the employee because the employee cooperated with the investigation, including being interviewed in private.

If the employee asks for another person to be present during the interview, the SO/IH must first determine whether the request by the employee was freely and voluntarily made under the procedures outlined in [Section XIV](#). Based on the employee's role with the employer and the relationship with the person whose presence is requested, the SO/IH must then determine whether and to what extent the person's presence will be permitted as outlined in this instruction. Lastly, the SO/IH must have the employee complete a MIOSHA Interview Notice of Rights and Consent Form to ensure the employee understands the rights, risks, and guidelines related to the interview and consents in writing to the person being present.

It is MIOSHA's policy that honoring an employee's request to have an individual present during his/her interview does not create an obligation or requirement that the SO/IH permit the requested individual to be present during the interview.

XIV. Determining Voluntariness.

To determine voluntariness, the SO/IH shall ask to speak to the employee briefly in private. If the employee or others present object to or question this request, the SO/IH shall inform them that before deciding whether to grant the request, the SO/IH must speak to the employee briefly to ensure the request is voluntary. Once in private, the SO/IH must ask the employee if anyone told the employee to request the person be present for the interview. If the employee states he/she was told to request the person's presence, the SO/IH is to ask the employee the following three questions:

- A. Who told the employee this?
- B. When was the employee told this?
- C. What did the person who told the employee to make the request say would happen if the employee did not request the person's presence?

If the employee indicates he/she was told they were required to make a request for the person to be present, or the employee was told failure to make the request would result in discipline by the employer or other ramifications, the SO/IH shall ask the employee if that is the only reason he/she made the request for the person to be present. If the employee answers "yes," the SO/IH shall consider the request to be involuntary or coerced and may deny the request for the person to be present. If the employee responds

“no,” or indicates he/she would have requested the same person’s presence without being told to, the SO/IH shall consider the request to be voluntary.

If the SO/IH determines during the voluntariness assessment that the employee representative, employer, employer representative, management officials, or an employer’s attorney has attempted to interfere with the SO/IH’s ability to conduct private interviews of non-managerial employees, the SO/IH should consult their supervisor to determine if these actions rise to the level of interference and a refusal under the Employer Interference section of the [FOM](#).

XV. Informal Interviews vs. Formal Interviews.

Per the FOM, informal interviews are private discussions with employees about safety and health concerns that are not required to be recorded on an interview form but are typically documented on the Violation Worksheet or Field Narrative. These types of informal interviews are typically shorter in duration and may occur during the walk-around inspection.

Formal interviews are normally reduced to writing on an Interview Statement Form. Formal interviews are typically longer in duration and the interviewee is asked to review and sign the interview statement. Formal interviews are to be used during fatality, accident, catastrophe or other high-profile investigations. Formal interviews are also to be used where the individual’s statement is the sole evidence available to establish the existence of a condition or occurrence of an event that is not observed by the SO/IH.

When a formal interview statement form is used and not completed by the interviewee himself/herself/themselves, the interviewee shall be given an opportunity to review the statement and make corrections as needed to ensure its accuracy. The SO/IH must ask the interviewee to sign the interview statement form whenever a form is used. If the interviewee declines to sign the completed formal interview statement form, the SO/IH shall indicate “declined” on the interviewee’s signature line.

When an employee requests a person to be present during an informal or formal interview, the SO/IH shall assess the nature of the relationships involved under [Section XVI](#) below. The SO/IH must then follow the guidelines outlined below in [Section XVII](#) for non-managerial employees and [Section XVIII](#) for managerial employees. If the SO/IH honors the employee’s request, the SO/IH and employee must review and complete the MIOSHA Interview Notice of Rights and Consent Form in [Appendix A](#). The form shall be included in the case file.

XVI. Nature of Relationship.

The role and suitability of a person’s presence in the interview with the employee may depend upon the level of managerial responsibility the employee has with the establishment and the person’s relationship to the employee. The SO/IH must therefore determine whether the employee is a non-managerial employee or managerial employee. The SO/IH shall also ask the employee who the person being requested to be present is and that person’s relationship to the employee and the employer.

XVII. Interviews of Non-Managerial Employees.

Due to their more tenuous employment status, non-managerial employees can be uniquely susceptible to influence and retaliation from their employers regarding their reporting of workplace hazards. Therefore, the SO/IH must evaluate a non-managerial employee's request for another person's presence during the interview to determine that the person requested to be present is not in a position to influence or deter the free and open exchange of information by the employee.

A. Union Representative.

If a non-managerial employee voluntarily requests that his/her union representative be present during the interview, the SO/IH shall make a reasonable effort to honor that request.

B. Member of Management.

The employer or a representative from the management team of the employer has no authority or entitlement to be present during the interview of a non-managerial employee. However, in certain situations, a non-managerial employee may feel more comfortable during the interview if accompanied by a member of management. If a non-managerial employee voluntarily requests a member of the employer's management team to be present during the interview, the SO/IH shall make a reasonable effort to honor that request.

C. Attorney.

If a non-managerial employee requests an attorney be present during the interview, the SO/IH shall inquire of both the employee and the attorney who the attorney has been hired to represent as a client. If the attorney is the employee's personal attorney, the SO/IH shall make a reasonable effort to honor that request.

If the attorney has been retained solely to represent the employer, the SO/IH must ask both the attorney and employee if the employee has been advised of the scope of the attorney's client relationship with the employer. If the employee or attorney indicates they have not discussed this, the SO/IH should provide the attorney and employee a chance to discuss the client relationship before proceeding. Once the employee has been advised of whose interests the attorney represents, if the employee still voluntarily requests the attorney be present during the interview, the SO/IH shall make a reasonable effort to honor that request. This provision applies to retained attorneys and attorneys who are general counsel for the employer.

If the attorney has been hired to represent both the employer and the employee, the SO/IH must ask both the attorney and employee if they have discussed the potential conflict of interest that the attorney representing both can pose. If the employee or attorney indicates they have not discussed this, the SO/IH should provide the attorney and employee a chance to discuss the client relationship before proceeding. Once the potential conflict of interest has been explained, if

the employee still voluntarily requests the attorney be present during the interview, the SO/IH shall make a reasonable effort to honor that request.

D. Relative/Other.

In certain circumstances, such as fatalities, serious injury accidents, or interviews involving employees who are minors, the presence of a parent, spouse, other adult relative, community member or clergyman, may foster an employee's willingness to provide information during an interview. If an adult employee requests that a relative or another significant other be present during the interview, the SO/IH should make a reasonable effort to honor that request at his/her discretion. If an employee under the age of seventeen (17) requests a parent/guardian be present during the interview, the SO/IH must make reasonable efforts to honor that request.

XVIII. Interviews of Managerial Employees.

A. Union Representative.

If a managerial employee requests that his/her managerial union representative be present during the interview, the SO/IH shall make a reasonable effort to honor that request.

B. Member of Management.

If a managerial employee voluntarily requests another member of the employer's management team be present during the interview, the SO/IH should make a reasonable effort to honor that request.

C. Attorney.

Due to the heightened level of authority delegated to most managerial employees, the information and statements provided by a managerial employee can be attributed and binding upon their employer in certain instances. Hence, employers may frequently request their attorney be present during interviews of managerial employees. If a managerial employee voluntarily requests the employer's attorney be present during the interview, the SO/IH should honor that request.

If a managerial employee voluntarily requests that his/her personal attorney be present during the interview, the SO/IH should honor that request.

Note: The first step in determining whether to let anyone be present is, "Is the request being freely made by the person to be interviewed?" If the answer is "No," the SO/IH can deny the request for the attorney/co-worker, etc. to be present. If the SO/IH determines the request was freely made by the person to be interviewed, then the attorney should be permitted in so long as the attorney does not interfere with the SO/IH's ability to conduct/complete the interview.

D. Relative/Other.

In certain circumstances, such as fatalities or serious injury accidents, the presence of a parent, spouse, other adult relative, community member, or

clergyman, may foster a managerial employee's willingness to provide information during an interview. If a managerial employee requests that a relative or another significant other be present during the interview, the SO/IH shall make reasonable efforts to honor that request at his/her discretion.

XIX. Interviews of Third Party's Employees.

In some cases, a MIOSHA inspection or investigation into an employer's workplace requires the SO/IH to interview employees of third-party organizations, such as emergency responders, subcontractors, manufacturers, engineering firms, insurance auditors, temporary labor providers, etc. Neither an employer, a member of their management team, or their attorney have the right or authority to be present during interviews of employees of third-party organizations. If an employee of a third-party employer requests the presence of a managerial employee, non-managerial employee, or attorney of the employer being inspected or investigated, the SO/IH may deny that request.

XX. Interference with Interview Process.

The SO/IH shall be in charge of questioning persons during interviews. The SO/IH has the authority to take reasonable steps to ensure that the person being interviewed is able to truthfully and openly respond to the questions posed. If the SO/IH feels an interviewee is not being truthful, the SO/IH shall explain to the interviewee that knowingly giving MIOSHA false information is a criminal offense under the MIOSH Act and get an acknowledgment that the interviewee understands.

The SO/IH has the authority to ensure that the interview is conducted without undue disruption or interference. An observer shall not be permitted to interfere with the SO/IH's ability to complete the interview in a timely, thorough, and civil manner. General rules for observers of MIOSHA interviews are listed on the back of the MIOSHA Interview Notice of Rights and Consent Form and should be shared with the observer prior to the start of the interview.

The SO/IH has discretion to determine whether the actions of the observer constitute interference with the interview. Any of the following actions may be considered interference by an observer during an interview:

- A. Interrupting the SO/IH during questioning.
- B. Objecting to the questions posed by the SO/IH.
- C. Rephrasing the questions posed by the SO/IH.
- D. Instructing the employee not to answer a question.
- E. Insulting, cursing, or raising his/her voice in an aggressive manner toward the employee or the SO/IH.
- F. Asking the employee additional questions.
- G. Requesting frequent or lengthy breaks beyond what is required to provide brief advice to the employee if the observer is the employee's attorney.

- H. Requesting frequent or lengthy breaks beyond what is required to tend to a personal need or medical condition of the employee or the observer.
- I. Coaching the employee's responses through non-verbal cues or gestures.
- J. Engaging in side-conversations with the person or SO/IH during the interview.
- K. Instructing the person to discontinue or exit the interview prior to the SO/IH indicating the interview is concluded.

If the SO/IH determines that the observer's presence or conduct is interfering with the interview and the collection of relevant information for the inspection or investigation, the SO/IH should politely advise the observer of the actions which the SO/IH believes are disruptive or are interfering with the interview process. The SO/IH should inform the observer that continuation of the conduct may result in the SO/IH revoking permission for the observer to be present for the remainder of the interview. If the conduct persists, the SO/IH shall request the observer exit the interview.

If the observer or employee refuses to allow the interview to proceed without the observer present, the SO/IH shall discontinue the interview and contact his/her supervisor to discuss options for completing the interview. Options may include conducting the remainder of the interview off-site, by phone, or via issuance of an administrative subpoena as outlined in the [FOM](#), Chapter V. Inspection Procedures.B.11.Administrative Subpoena. In deciding next steps, the supervisor and SO/IH should consider the information gathered thus far during the employee interview; the remaining information sought; and whether the remaining information sought can be obtained in another manner.

XXI. Interviews Conducted via Administrative Subpoena.

Per Section 29(3) of the Act and the [FOM](#), an administrative subpoena may be issued to compel an uncooperative person or employer to appear for the taking of testimony or to produce documents reasonably necessary for the completion of an inspection. The Michigan Administrative Procedures Act, P.A. 306 of 1969, as amended, does not contain a provision which entitles an employee compelled to appear by administrative subpoena to be accompanied, represented, or advised by counsel or another individual. However, if an employee appearing under an administrative subpoena requests a person be present during his/her interview, the SO/IH may deny or honor the request consistent with the guidelines for interviews of non-managerial and managerial employees contained in this instruction. If the employee appearing under subpoena is permitted to have an individual present, the SO/IH and employee shall review and complete the MIOSHA Interview Notice of Rights and Consent Form contained in [Appendix A](#). The form must be included in the case file.

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Appendix A
MIOSHA INTERVIEW NOTICE OF RIGHTS AND CONSENT FORM

I _____, acknowledge that I have been notified by MIOSHA of the following regarding the interview to be conducted by a MIOSHA representative and consent as follows:

- The Michigan Occupational Safety and Health Act permits a MIOSHA representative to question me privately.
- The Michigan Occupational Safety and Health Act prohibits, among other things, my employer from retaliating against me in any manner because I was interviewed, privately or non-privately, by a MIOSHA representative.
- The Michigan Occupational Safety and Health Act protects the confidentiality and limits the disclosure of information provided to a MIOSHA representative by an employee in connection with an inspection or investigation, to the extent provided by law.
- The presence of an individual during the interview, other than the MIOSHA representative and I, may impact the confidentiality or disclosure protections of any statements or information I provide to the MIOSHA representative during the interview.
- If the individual requested to be present is an attorney not hired by me directly or on my behalf as the client, there may be a potential conflict of interest which I should discuss with the attorney before the attorney's presence is permitted.
- The MIOSHA representative shall have sole discretion regarding whether to permit an individual, other than myself and the MIOSHA representative, to be present during the interview.
- Any individual permitted to be present during the interview will be an observer, not an active participant in the interview, but if the person is my attorney, they will be permitted to advise me prior to the interview or during breaks.
- The MIOSHA representative may revoke allowance of the individual to be present if his/her presence or conduct is interfering with the collection of information related to the MIOSHA inspection/investigation.

Knowing the above, I am voluntarily consenting to the following person being present during my interview with the MIOSHA representative:

Name

Title/Relationship

Interviewee's Signature: _____ Date: _____

MIOSHA Representative (as Witness) _____

Appendix A OBSERVER GENERAL RULES

The following rules apply to an individual permitted to be present during a MIOSHA interview:

- **No talking during the interview.** This includes:
 - interrupting the MIOSHA representative during questioning.
 - objecting to the questions posed by the MIOSHA representative.
 - rephrasing the questions posed by the MIOSHA representative.
 - instructing the employee not to answer a question.
 - insulting, cursing, or raising his/her voice in an aggressive manner toward the employee or the MIOSHA representative.
 - asking the employee additional questions.
 - engaging in side-conversations with the person or MIOSHA representative during the interview.
- **No coaching the employee's responses through non-verbal cues or gestures.**
- **No delaying of the interview process.** This includes:
 - requesting frequent or lengthy breaks beyond what is required to provide brief advice to the employee if the observer is the employee's attorney.
 - requesting frequent or lengthy breaks beyond what is required to tend to a personal need or medical condition of the employee or the observer.
 - instructing the person to discontinue or exit the interview prior to the MIOSHA representative indicating the interview is concluded.
- **No audio or video recording of the interview without the knowledge and consent of the interviewer.** If recording is permitted, a full and complete copy of the recording, or any transcript produced of the recording, is to be furnished to the MIOSHA representative upon request at no expense.
- **Do not interrupt the interview questioning to share pertinent materials.** Information or materials in the possession of the observer should be provided to the MIOSHA representative prior to the start of the interview or at the end.